

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 10874 of 2001****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment?
 - 2 To be referred to the Reporter or not?
 - 3 Whether their Lordships wish to see the fair copy of the judgment?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?
 - 5 Whether it is to be circulated to the civil judge?
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RAJNIKANTABEN NARENDRAKUMAR SHAH - Petitioner(s)
Versus
STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :

MS SONAL R SHAH for the Petitioner
MS MANISHA L SHAH, A.G.P. for Respondent No. 1
MS HARSHAL PANDYA for MR PARESH UPADHYAY for Respondent No. 3
DS AFF.NOT FILED (R) for Respondent(s) : 4,
Rule served to Respondent No.5

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**Date : 23/03/2006****ORAL JUDGMENT**

1. In the present petition, the petitioner has challenged her seniority position in the Cadre of Senior Scientific Assistant (hereinafter to be referred to as "SSA" for short). It is the case of the petitioner that

in the said cadre she should have been shown senior to Respondents Nos. 3,4 and 5, who were wrongly shown to be senior to her.

2. Short facts leading to the present petition are as follows:

2.1 The petitioner joined the services with Respondent No.2 – Forensic Science Laboratory in February 1978 as a Laboratory Technician. She was posted in Ahmedabad. She was thereafter promoted to the post of Junior Scientific Assistant (hereinafter to be referred to as "JSA" for short) in July 1979. It is not in dispute that in the cadre of SSA, the petitioner was senior to respondent Nos. 3 to 5. The petitioner was shown at serial number 8 in the seniority list in the cadre of JSA as on 01.01.1985 whereas respondent Nos. 3 to 5 were shown at serial nos. 9 to 11 respectively in the seniority list.

2.2 In the year 1987, the petitioner suffered burn injuries and later on also became victim of Tuberculosis. She therefore had to apply for medical leave for the period from 12.03.1987 to 30.11.1987. The petitioner's

leave application was granted. She was sanctioned medical leave for the said period.

2.3 It appears that while the petitioner was still under medical leave, respondent Nos. 1 and 2 issued promotion order on 25.05.1997 for the post of SSA from the cadre of JSA. The petitioner was one of the employees who was offered such promotion. She was posted at Junagadh on promotion. It is the case of the petitioner that since she was on leave at the time when such promotion order came to be issued, she was not aware about the same, since the official-respondents never communicated the same at her address.

2.4 The petitioner eventually resumed the duty and approached the official-respondents seeking her promotion since she had come to know about such movement. The petitioner however, conveyed to the department that considering her health condition it was not possible for her to discharge her duties outside Ahmedabad and that therefore, she be promoted at Ahmedabad.

2.5 The petitioner made first representation on 29.08.1987 requesting the authorities that she be granted

promotion at Ahmedabad. She stated in her representation that she is suffering from T.B., that she received 45% burn injuries which requires further operation. She also has aged in-laws to look after. Her husband is serving at Gandhinagar. She therefore, submitted that outside Ahmedabad there is no one who would look after her. She therefore, requested that she may be promoted and posted at Ahmedabad.

2.6 The respondents however, did not find it possible or appropriate to accept the request of the petitioner for being promoted at Ahmedabad. Through correspondence between respondent no.2 and 1, a decision was taken that it was not possible to retain her at Ahmedabad on promotional post and that therefore, she should be retained at Ahmedabad on condition that she will have to forego the promotion.

2.7 Deputy Secretary, Home Department conveyed the above decision of the Government to the petitioner in his letter dated 07.11.1987 made to the Director of the Forensic Laboratory. In the said letter, it was conveyed that on the condition of foregoing promotion, she should be retained at Ahmedabad and in future if vacancy is

available in Ahmedabad, her case should be considered. In fact it is the case of the official-respondents that at the relevant time there was no vacancy on promotional post. The petitioner made series of representations and represented her personal difficulties and urged the department to retain her at Ahmedabad on promotional post. It is the case of the petitioner that though she had shown her preference for being granted promotion at Ahmedabad, at no stage, she had declined to accept the promotion on transfer. Be that as it may, the fact remains that promotion of the petitioner was treated to have been cancelled.

3. On subsequent vacancy, the respondent Nos. 3 to 5 came to be promoted to the post of SSA. In the affidavit-in-reply filed by the State Government it emerges that respondent No.3 was promoted on 20.06.1987 and posted at Surat. Respondent No.4 was promoted on 19.01.1988 and posted at Junagadh and respondent No.5 was promoted on 12.08.1988 and posted at Surat.

3.1 It may be noted at this stage that eventually, on available vacancy at Ahmedabad the petitioner was promoted to the post of SSA on 25.01.1989.

3.2 It is the case of the petitioner that on account of illegal steps taken by respondent nos. 1 and 2, she has suffered loss of seniority vis-a-vis respondent no.3,4 and 5 in the cadre of SSA. Broadly, stated it is the case of the petitioner that she had never refused promotion though she had shown preference for being promoted at Ahmedabad. Secondly, it is the case of the petitioner that even if the petitioner is treated to have declined promotion, upon her eventual promotion in the cadre of SSA, her seniority of the lower cadre should have been restored. In this regard, the petitioner pointed out the seniority list for the cadre of SSA circulated vide Circular dated 16.12.1993. In the said seniority list for the post of SSA as on 01.01.1993, the petitioner is shown at Sr.No. 13. It is not in much dispute that respondent Nos. 3 to 5 figure at Sr. No. 10 to 12 in the same seniority list.

3.3 The petitioner has made series of representations starting with representation dated 27.07.1994 objecting to her seniority position in the cadre of SSA. It is the case of the petitioner that none of these representations were replied to and finally in the year 1999, fresh seniority list for the post of SSA

was published in which injustice was done to the petitioner. She was shown junior to respondent nos. 3, 4 and 5. She has therefore, filed the present petition and challenged the action of official-respondents.

4. The State Government has filed its reply statement and contended inter-alia that in May 1987 when the petitioner was granted promotion to SSA and posted at Junagadh, she did not accept her promotion. She was retained at Ahmedabad on condition that she foregoes promotion. She therefore, cannot claim seniority in the cadre of SSA over other who were promoted to SSA, on account of her unwillingness to accept promotion on transfer. It is further contended that promotions were made in the year 1988-89 and the petitioner cannot now reopen the case of her non-promotion at the relevant time, even if it is her case that she had not declined promotion.

5. Learned Advocate Ms. Harshal Pandya for Mr. Paresh Upadhyay, learned Advocate for respondent No.3 submitted that the petitioner has not made out any case for interference. Respondent No.3 is enjoying seniority over the petitioner right from the beginning. Respondent No.3

was promoted ahead of the petitioner in the cadre of SSA. Such a seniority position cannot be revised at this stage.

6. Having heard the learned Advocates for the parties, it would appear that it is not possible at this stage to reopen the issue of promotion granted to the petitioner in May 1987 to the post of SSA. The petitioner was offered promotion by an order dated 25.05.1987. She was posted at Junagadh. For her personal reasons, the petitioner could not accept the promotion on transfer. The department therefore, decided to retain her at Ahmedabad however on the condition that she foregoes promotion. The petitioner never challenged this position. The petitioner had made representations. In none of the representations, she clearly stated that she was and is still willing to discharge her duties outside Ahmedabad. Though contended by the learned Advocate for the petitioner, I am unable to accept that such representation is coming out from the petitioner in any of her representations made to the authorities. If that was so, the petitioner would have staked her claim for promotion when further promotions were being granted to others at Junagadh and at Surat. These promotions were

given after May 1987. Even if there was some dispute about the communication of the promotion order of 25.05.1987 and about the petitioner's willingness to get promotion on transfer, subsequently when the department issued further promotion orders outside Ahmedabad, the petitioner made no grievance about her non inclusion in the promotion orders. All this would demonstrate that the petitioner was interested in promotion and posting only at Ahmedabad. Even otherwise, as noted earlier, the petitioner has never challenged her non promotion in the year 1987, even if she had any grievances about the same. This however, does not suggest that the petitioner was not justified in requesting the department that she should be considered for promotion and posted at Ahmedabad. The petitioner made sufficient grounds before the department to accept her request. She had also pointed out that she was suffering from T.B. She had received burn injuries, that her injuries and illness required further treatment, that she had incurred huge debts for unpaid medical bills. She pointed out that outside Ahmedabad there was no one else to look after her under such condition. However, the department could not sanction the request of the petitioner for want of vacancy in Ahmedabad. Be that as it may, this Court is

not directly concerned with the non-promotion of the petitioner in May 1987. As noted above the petitioner never challenged the non promotion at any stage.

7. This however does not bring an end to the legal controversy arising in this petition. Learned Advocate for the petitioner pointed out that the Government had issued circular dated 30.11.1965 to cover the cases of officials who for various reasons are unable to accept promotion on transfer. In the said circular, it is stated inter-alia that such refusal to accept promotion can be placed in three categories. In first category are cases where for reasons beyond the control of the employee, such as T.B., are required to be posted at appropriate places for treatment. Second category is for such cases where for personal reasons, such as studying in morning or evening colleges which are not available on transfer places and employees unable to accept promotion on transfer. Third category is where the employee declines promotion for better place of posting.

8. It is provided that in second and third category of the cases, seniority of the employees will be considered only from the date of joining the promotional post. In

the first category, it is provided that if the reasons stated by the employee are of permanent nature, he or she shall suffer loss of promotion permanently. However, if the reason indicated is temporary and employee accepts promotion and joins the promotional post within one year of the date of promotion of his junior in the lower cadre, seniority position as obtained in the lower cadre will be maintained. In the present case, when the promotion was being offered to her, the petitioner was on medical leave. Obviously, a person who is unable to discharge her normal duties on her place of posting cannot be expected to report for duty on promotional post at transferred place while still under medical treatment. The petitioner eventually, was given and did accept the promotion on 25.05.1989. I find that her case has to be considered within the parameters of Resolution dated 30.11.1965. Her case falls in first category specified therein. Her declining of promotion was of temporary nature. She therefore, will retain her seniority position vis-a-vis her juniors in the lower cadre provided her promotion was within one year of date of promotion of her junior. As noted earlier respondent No.3 was promoted to the post of SSA on 20.06.1987. Respondent No.4 was promoted on 19.01.1988 and respondent No.5 was promoted

on 12.08.1988. The petitioner was promoted on 25.01.1989. With respect to respondent Nos. 3 and 4 even as per said G.R., the petitioner cannot hope to retain her seniority of the feeder cadre. With respect to respondent No.5 however, since the promotion of the petitioner was well within the span of one year of the date of promotion, of respondent no.5, seniority position in the lower cadre shall have to be restored in the cadre of SSA also. I am convinced of the fact that earlier seniority list was prepared by the department in the year 1993. The petitioner however suggested that seniority list was never made available to her. She made series of representations against her seniority placement in the cadre of SSA. None of these representations were replied to and eventually when the seniority position was reiterated in the fresh seniority list in the year 1999, the petitioner was compelled to approach this Court challenging her seniority. Under the circumstances therefore, I find that the claim of the petitioner to retain her seniority can be accepted only to the limited extent. It may be noted that in the meantime and even at present the petitioner and respondents Nos. 3 to 5 have not been further promoted and all of them are still in the cadre of SSA.

9. In the result, the petition succeeds to the limited extent. The petitioner shall be shown senior to Respondent No. 5. Seniority list shall be amended accordingly. The claim of the petitioner that the petitioner is senior to respondent Nos. 3 and 4 is however, not accepted.

10. In the result, the petition is allowed to the above extent and disposed of. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

[Akil Kureshi, J.]

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